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No. 88-579

In The

Supreme Court of the United States

October Term, 1988

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

vs.

UNITED JERSEY BANK, a New Jersey Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION PURSUANT TO SUPREME COURT RULE 22.6

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Citation of Statute Involved:

11 U.S.C. §502(a):

§502. *Allowance of Claims or Interests*

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partnership that is a debtor under Chapter 7 of this title objects.

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REASONS FOR DENYING THE WRIT

THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE RECENT DECISION OF THE FIFTH

CIRCUIT IN D-1 ENTERPRISES, INC. V. COMMERCIAL STATE BANK.

Contrary to the assertions by Petitioner Oneida Motor Freight, Inc. ("Oneida"), the Third Circuit's decision in this case in no way conflicts with the recent decision of the Fifth Circuit in *D-1 Enterprises, Inc. v. Commercial State Bank,* 852 F.2d 823 (5th Cir. 1988), a case first cited by Oneida in its reply brief.[1] In fact, the court's holding in *D-1 Enterprises* was limited to the applicability of *res judicata* and the compulsory counterclaim rule to the particular facts and circumstances of that case where the debtor *abandoned* its property to its secured creditor and did not address or even consider the issues of equitable and judicial estoppel on which the Third Circuit relied in rendering its decision. (Petitioner's Original Appendix 2, hereinafter "Pet. App.").[2] Nor did the court in *D-1 Enterprises* have to consider the *res judicata* effect of an order confirming a Plan of Reorganization. *See Stoll v. Gottlieb,* 305 U.S. 165, reh'g denied 305 U.S. 675 (1938).[3]

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1. This supplemental brief is being filed on behalf of Respondent United Jersey Bank ("UJB") pursuant to Supreme Court Rule 22.6 to address the recent holding of the Fifth Circuit in *D-1 Enterprises, Inc. v. Commercial State Bank,* 852 F.2d 823 (5th Cir. 1988), pet. for reh'g and reh'g *en banc* pending, a case which was not cited by Oneida in its Petition for a Writ of Certiorari.

2. In an attempt to create a conflict where none exists, Oneida misrepresents the holding and the rationale of the Fifth Circuit's decision in *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988) cert. denied, 57 U.S.L.W. 3306 (1988). In that case, the court found that the failure to include information in a disclosure statement about a claim which was "mere conjecture" did not render the disclosure statement inadequate. *Id.* at 1157. *See also,* UJB's Brief in Opposition at 6-7, which discusses the holding of the *Texas Extrusion* case.

3. Indeed, *Stoll v. Gottlieb* was not even cited by the Court in *D-1 Enterprises.*

In *D-1 Enterprises*, the Fifth Circuit went to great lengths to detail the numerous and significant factual distinctions between that case and its prior decision in *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984). The distinguishing factors cited by the court in *D-1 Enterprises* highlight the substantial differences between the case now before the Court and *D-1 Enterprises* and clearly demonstrate how the two decisions are reconciled.

First, in the present case, Oneida did not commence its action against UJB until seven months after Oneida's plan of reorganization was confirmed, and more than one year after the extent, validity and priority of UJB's lien was finally established by a series of bankruptcy court orders consented to by Oneida. *See* UJB's Brief in Opposition at 4-5. In contrast, the debtor in *D-1 Enterprises* filed an adversary proceeding against its secured lender in Bankruptcy Court *during the debtor's pending bankruptcy case* and prior to the termination of the debtor's reorganization proceedings. *D-1 Enterprises, Inc. v. Commercial State Bank*, 852 F.2d at 824. As was noted by the court in *D-1 Enterprises*, "the end of the reorganization is the critical point" in determining the claim preclusive effect of a prior bankruptcy court order. *Id.* at 825. *See Stoll v. Gottlieb*, 305 U.S. 165, reh'g denied 305 U.S. 675 (1938) (affirming the finality and integrity of bankruptcy court orders confirming plans of reorganization and holding that such orders preclude a party from relitigating any of the matters that *could have been raised during the bankruptcy proceedings). See also*, 5 *Collier on Bankruptcy* ¶ 1141.01(1) (15th Ed. 1988).

Second, in the present case and in *Southmark Properties*, the operative bankruptcy court orders "necessarily determined" the precise amount of debt owed to the secured creditor and that the debt had been validly accelerated, while no such determination was made in *D-1 Enterprises*. *D-1 Enterprises, Inc. v. Commercial*

State Bank, 852 F.2d at 825-826. In the instant case, four separate bankruptcy court orders were entered confirming the validity of UJB's claim against the Oneida, culminating in the Bankruptcy Court's Order of January 14, 1986 which established the extent, validity and priority of UJB's claim against the Debtor for $7,631,322.73. (Respondent UJB's Appendix 18a-19a, hereinafter "Resp. App."). In recognition of UJB's lawful acceleration of the Oneida indebtedness, the Bankruptcy Court ordered that the proceeds from the sale of UJB's collateral be *unconditionally* paid to UJB. (Resp. App. 16a). As was noted by the Fifth Circuit in its analysis of the *Southmark Properties* case, such actions are inconsistent with Oneida's later assertion of lender liability claims against UJB. *D-1 Enterprises v. Commercial State Bank,* 852 F.2d at 825-26, citing *Southmark Properties,* 742 F.2d at 869.

Another distinguishing characteristic of the present case is that Oneida was specifically authorized to and did affirm, ratify and adopt its pre-petition loan agreement and security agreement with UJB pursuant to the July 12, 1985 Order of the Bankruptcy Court. (Resp. App. 2a). Further, in *D-1 Enterprises,* the debtor's assets were *abandoned* to its secured creditor, *D-1 Enterprises,* 852 F.2d at 824-826, while in this case and in *Southmark,* the secured creditor's collateral was *sold* pursuant to bankruptcy court order. (Resp. App. C); *Southmark Properties Corp. v. Charles House Corp.,* 742 F.2d at 872.

Fourth, as was expressly recognized by the Third Circuit, Oneida obtained UJB's consent to the use of $1.5 million of UJB's cash collateral while it remained deceptively silent as to any alleged claims against UJB. (Resp. App. 12; Pet. App. A and B).

Fifth, Oneida never asserted its alleged claims against UJB at any time during its settlement negotiations with UJB or in the

extended proceedings leading to confirmation of its Plan of Reorganization. In *D-1 Enterprises,* the debtor clearly disclosed its intention to pursue claims against its secured creditor by obtaining a bankruptcy court order authorizing the debtor to hire outside counsel to pursue potential lender liability claims against the secured lender, and then commencing its action *during the debtor's continuing bankruptcy case.* 852 F.2d at 824 (emphasis added). *Compare Paradise Hotel Corp. v. Bank of Nova Scotia,* 842 F.2d 47 (3d Cir. 1988), where the Third Circuit held that the debtor had preserved its claims against the debtor's secured creditor by unequivocally disclosing its intent to pursue those claims in the *initial* responsive pleadings filed with the bankruptcy court. *Id.* at 48-52.

In this case, Oneida did not bring its action against UJB until *after* the validity of UJB's claim was established and seven months *after* Oneida's Plan of Reorganization, which did not include any alleged claim against UJB, was confirmed by final order of the bankruptcy court. (Resp. Brief at 4-5). *See Stoll v. Gottlieb,* 305 U.S. 165, reh'g denied 305 U.S. 675 (1938). Moreover, Oneida did not object to UJB's filed proof of claim at any time prior to confirmation. As a result, UJB's claim was deemed to be allowed under 11 U.S.C. § 502(a) (1988).

Finally, the Order confirming Oneida's Plan of Reorganization (Resp. App. F), the Plan of Reorganization itself, and Oneida's Disclosure Statement expressly provided for separate classification and payment of UJB's deficiency claim against Oneida, but made no attempt to set-off or expressly reserve Oneida's right to pursue its alleged lender liability claims against UJB, nor did Oneida's Disclosure Statement, Schedules or Statement of Affairs reserve any rights with respect to those claims.

(Pet. App. 7-8).[4] Further, Oneida clearly recognized the requirement that pending or contemplated litigation be disclosed since it included a separate section in its disclosure statement entitled *Pending and Possible Litigation Affecting Distribution to Creditors.* While that section mentioned several specific claims Oneida intended to pursue, *it did not make any reference to the alleged claims against UJB.* (Pet. App. 8-9). *See Monroe County Oil Co. v. Amoco Oil Co.,* 75 B.R. 158 (S.D. Ind. 1987).

As a result of Oneida's "deafening silence" with regard to its alleged claims against UJB and in order to preserve the requisite reliability of disclosure statements and to provide assurances to creditors regarding the finality of plans which are approved, the Third Circuit properly held that Oneida was equitably and judicially estopped from pursuing its alleged claims against UJB, and concluded that "Oneida's failure to list its claim against the bank worked in opposition to the preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect." (Pet. App. 9-10, 14).

As is demonstrated above, the holding of the Fifth Circuit in *D-1 Enterprises* and that of the Third Circuit are not in conflict and are actually reconciled by the distinct factual contexts of each case, rather than any conflict in the legal principles applied by each court. The absence of any such actual conflict requires that Oneida's petition for a writ of certiorari be denied.

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4. Although Oneida failed to reserve any rights with respect to its alleged lender liability claims, it did temporarily reserve rights *only* as to a specific claim against UJB for service charges. (Resp. App. 19a). By Order entered on March 3, 1986, the reservation of rights contained in the January 14, 1986 Order was expressly terminated upon payment of the sum of $12,164.09 to Oneida by UJB. (Resp. App. 21a).

CONCLUSION

Based on the foregoing and for the reasons set forth in United Jersey Bank's Brief in Opposition to Oneida's Petition for a Writ of Certiorari, it is respectfully submitted that Oneida's Petition should be denied.

Respectfully submitted,

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